IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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MICHAEL RODAK, JR.

No. 71-718

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

REPLY BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Office & P.O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
of Counsel

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ARGUMENT

The three-judge court below incorrectly analyzed the nature of the good behavior allowances awarded pursuant to Section 230(3) of the Correction Law.

1. The Awarding Of Good Behavior Time Is Not Solely A Punitive Disciplinary Device

Appellees claim that the regulations of the Department of Correctional Services show that good behavior time is a punitive device for disciplining a prisoner. They set forth a series of regulations relating to adjustment committees and superintendent proceedings that may result in

a loss of a specific period of good behavior allowance for serious instances of inmate misbehavior. 7 N.Y.C.R.R. Parts 251, 252 and 253 [Brief for Appellees, pp. 9-10]. They therefore argue that it does not matter in what type of institution a prisoner is confined, if the only objective in the awarding of good behavior credit is to maintain prison discipline.

However, the fact that good time can be lost for misbehavior does not mean that the awarding of good time is solely or even primarily related to good or bad conduct apart from any considerations of participation in a full prison program. The regulations of the Department of Correctional Services now specifically spell out exactly what is entailed in the awarding of good behavior time, and show that the institutional programs are very important in determining awards of good time.

7 N.Y.C.R.R. 260.1(a) states that "[T]he opportunity to earn good behavior allowances offers inmates a tangible reward for *positive efforts* made during incarceration" (emphasis added). Section 260.3 sets forth the criteria for awarding allowances and states:

> "(b) In evaluating the amount of allowance to be granted, the statutory criteria (i.e. good behavior, efficient and willing performance of duties assigned, progress and achievement in an assigned treatment program) shall be viewed in the light of the following factors:
>
> (1) The attitude of the inmate;
>
> (2) The capacity of the inmate; and
>
> (3) The efforts made by the inmate within the limits of his capacity."

These factors are evaluated by a time allowance committee, whose purpose is to make recommendations to the

superintendent as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance. 7 N.Y.C.R.R. 261.2. The time allowance committee awards good time on the following criteria [7 N.Y.C.R.R. 261.3]:

> "(d) *The committee shall consider the entire file of the inmate* and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, *applying the principles set forth in sections 260.3 and 260.4 of this Part.*
>
> (e) *The committee* shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but *shall appraise the entire institutional experience of the inmate* and make its own determination." (Emphasis added)

The time allowance committee meets each inmate at 3-year intervals or prior to the time the inmate is eligible to meet the parole board or to be released conditionally. 7 N.Y.C.R.R. 261.3(a) and (b).

It is thus clear that good time is awarded for more than the avoidance of bad conduct, but encompasses "the entire institutional experience of the inmate." Indeed, if good time is deducted for inmate misbehavior, the inmate may still be re-credited with this time at the time he is eligible for parole if the time allowance committee finds his subsequent behavior, as defined in 261.3(d) and (e), merits restoration of credit. Section 261.3(g).

All of this points out the relationship between good conduct and willing performance of duties, and shows that the awarding of good time is not solely a disciplinary device that can be applied indiscriminately between the totally different institutional settings of state correctional facili-

ties and county jails. The regulations set forth the need for close evaluation of an inmate's attitude, capacity and efforts in all aspects of his institutional experience. This not only emphasizes the necessity of evaluation by state personnel, but shows the importance of viewing the overall performance of an inmate in a full correctional program apart from any considerations of good or bad conduct in a punitive sense. Since the full correctional programs of state prisons cannot even begin to be compared with the purely custodial functions of county jails, the awarding of good time based on efforts for participation in these programs can reasonably differ.

2. State Prisons Are Totally Different From County Jails

Appellees assert, for the first time, that "it does not appear that county jails differ significantly from state prisons. . . ." [Appellees' Br., p. 14]. It is strange that they have waited until the filing of their brief on the merits in this Court to make this assertion, as they never alleged this in their complaint and never before challenged the affirmation of appellants that state prisons differed from county jails in purpose, usage and availability of facilities. [See Complaint, Appendix, pp. 5a-9a; Affidavit of Deputy Commissioner John R. Cain, Appendix, p. 19a]. Indeed, in the absence of any allegation whatever to the contrary, the three-judge court did not even consider this to be an issue and decided the case on the assumption that county jails were primarily detention centers that lacked the programs and services offered in state prisons [Appendix, p. 59a]. Appellees now attempt to show that county jails have programs similar to that of state prisons. Their purported demonstration of this assertion has little to do with the issues in this case.

It is true, as appellees argue, that the State Commissioner of Correction has promulgated guidelines for rehabilitative programs at county jails (Appellees' Br., pp.

15-17). See 7 N.Y.C.R.R. Part 5101. However, these are only guidelines and they do not reflect the reality of the conditions of the county jails. The guidelines, first enacted in July 1, 1968, explicitly admit that previous rehabilitative efforts have been minimal. 7 N.Y.C.R.R. § 5101.1(a) sets forth the background of these efforts and states that "[T]he dimension of treatment has hitherto been a largely neglected phase in local penal operations." One of the reasons for this neglect was "the high number of detention prisoners." The regulation continues [7 N.Y.C.R.R. § 5101.1(b)]:

> "The idleness which has been found existent in most county institutions is likewise not a new discovery and despite efforts made over the years by individuals and groups conversant with such problems, no concerted efforts have been made to propose a practical and effective remedy."

The State has recognized the inadequacy of programs in county jails and is cooperating with local officials to alleviate them. However, the rehabilitative programs listed in 7 N.Y.C.R.R. § 5101.4 are merely goals that "can be implemented." Appellees' citing of a 1970 report listing programs now available in the Nassau County Jail [Appellees' Br., p. 17] shows a commendable effort on the part of Nassau County officials to end the characteristic idleness of pretrial detainees, but it has no relevance to the class represented by appellees, which consists of inmates with pre-1967 convictions.* None of the named plaintiffs alleged they participated in any rehabilitative programs prior to sentencing (see Complaint, Appendix, pp. 5a-9a), and, in view of the language of 7 N.Y.C.R.R.

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* Appellee Rutherford was incarcerated in the Nassau County Jail from March to November, 1966. Appellee Royster was incarcerated in the Nassau County Jail from April 1965 to May 1966 [Appendix pp. 18a, 21a].

§ 5101.1, which was enacted in 1968, it is doubtful if any such programs existed in 1966.**

Appellees have not presented in any court a single instance of a member of their class having participated in any program in a county jail to even raise an issue of fact. While people convicted of misdemeanors may have fully served their time in county jails and received good time credit for pre-sentence confinement on their definite sentences, this does not mean that they participated in any

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** The pre-1967 conditions in local institutions for confinement of pretrial detainees is best illustrated by the conditions in New York City, which supplies the bulk of New York's state prison population and which in 1966 admitted to its detention facilities 77,502 inmates. 1967 Annual Report, The City of New York Department of Correction, p. 9. The 1965 summary report of eleven years progress, published by the Department itself, presents a bleak picture of the local detention centers. See "Progress Through Crisis, 1954-1965", The City of New York Department of Correction. This document reported that severe overcrowding resulted in the use of potential rehabilitation, treatment and recreational quarters for housing (*Id.* at p. 25), and concluded that an underpaid, undermanned staff and a paucity of equipment, resources and facilities prevented the formation of any adequate rehabilitation programs (*Id.* at p. 49). As the capital construction report noted (*Id.* at 373):

> "In all our detention quarters, however, full utilization of educational, therapeutic and recreational opportunities still awaits the day of adequate staff and facilities, and the budget to supply them."

The 1967 Annual Report presents the same picture. This report stated (1967 Report, p. 8):

> "Each of our detention facilities are seriously overcrowded, requiring the doubling up on inmates in areas originally built to house one individual. In the various detention facilities the rate of occupancy has been up to 180% of capacity during 1967."

The situation has become so acute that the Legislature has authorized the State Commission of Correction to lease to any city or county parts of state facilities to house locally held inmates. Correction Law, Section 28 (formerly Section 6-g, added L. 1966, ch. 651).

rehabilitation programs either.* As appellants have noted, the good time awarded for penitentiary and county jail inmates who are actually serving definite sentences is off the maximum (there is no minimum on definite sentences), and the Legislature has determined that the need for supervision and participation in full correctional programs of misdemeanants and other lesser violators is not that essential to mandate the sensitive pre-release evaluation required of felons. Correction Law, §§ 230(3); 250 [Appellants' Br., p. 20, fn.].

Appellees also note that good time is awarded to members of their class who are transferred to state reformatories or state hospitals for the criminally insane. It is difficult to see how this diminishes the validity of Section 230(3). These are two classes of inmates who have been transferred to state institutions that have programs specifically designed for their specialized needs. Willing participation and performance in these treatment programs, under state supervision, would certainly call for the awarding of good time. What is at issue is not a difference in programs between state institutions, but the unavailability of any such programs for pre-trial detainees

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* The Legislature indicated its awareness of the lack of rehabilitative facilities in county jails by actually *reducing* the amount of good time that could be earned in county jails. Under the new Penal Law effective September 1, 1967, definite sentence prisoners in county jails can earn good time up to one-sixth of their maximum sentence [Penal Law, § 70.30(4)(b)] as opposed to their previously being able to earn good time up to one-third of that maximum [Correction Law, § 230(2)]. The Practice Commentary following Section 70.30 sets forth the rationale for this lesser allowance in part as follows [McKinney's Revised Statutes Book 39, Penal Law §§ 1.00 to 219 (1967 Ed.), p. 145]:

> "(2) in order to earn the ten day allowance in a state prison the inmate must render satisfactory performance measured by a number of criteria, *while a county institution inmate usually receives the total allowance for sitting quietly in his cell.*" (Emphasis added).

in county jails. Nor is there any significance to appellees' claim that inmates initially received immediately after sentence in a state reception center do not participate in a full prison program. These centers are used for orientation prior to a determination being made as to where an inmate will be sent to serve his sentence. This orientation could be perhaps the most important determinant of an inmate's success in prison, and willing participation in the orientation program certainly can be evaluated and rewarded by the state. Appellees have thus not produced any significant facts to show that time spent in a county jail is equivalent in any manner to time spent participating in a full state correctional program.

Since state prisons are different from county jails in usage, facilities and purposes, there is a rational basis for differences in awarding good behavior time. Appellees' suggestion that the Parole Board's consideration of pre-minimum sentence release can alleviate some of the problems of inmate evaluation [Appellees' Br., pp. 18-22] fails to recognize that the Legislature did not intend that the Parole Board be *allowed* to exercise its discretion until after a prescribed minimum amount of state supervision had occurred [See Appellants' Br., p. 26]. Appellees are thus trying to substitute their judgment for that of the Legislature in an attempt to persuade this Court to enforce what to them is a wiser state correctional scheme. The courts cannot second guess state legislatures. Given the rational basis for the statutory distinctions at issue, there is no constitutional violation in the State's enforcement of Section 230(3).

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, October 3, 1972

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL COLODNER
Assistant Attorney General
of Counsel